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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICK CHHOUN,

Defendant and Appellant.

G042713

(Super. Ct. No. 08WF0732)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

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Sufficient evidence supports the jury's gang enhancement findings and defendant's street terrorism conviction. The court did not err in imposing punishment for both the burglaries and street terrorism convictions. Affirmed.

## I

### FACTS

A jury found defendant Rick Chhoun guilty of two counts of first degree burglary and found it to be true he committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang. The jury also found him guilty of the crime of street terrorism. The court sentenced defendant to state prison for nine years.

Jeff Ky Le testified he lives with his wife and seven-year-old child in a single-story house divided into three sections, in Westminster. Two other families rent from Le and also live there. Video cameras are placed outside the home. In late February 2008, he came home at 2:00 or 3:00 o'clock in the afternoon and found his home had been entered and ransacked. He examined the video from the surveillance cameras and saw people he neither knew or gave permission to enter his home.

Suzanne Thai also lived in a section of the house with two other people. On February 26, 2008, she came home and found that items in her house "were not in proper order." She had not given anyone permission to enter the home. Thai did not remember all that was missing but said it was mainly jewelry. Thai's son, Philip Huynh, said besides jewelry, there was \$8,000 in cash, a laptop and a camera missing.

Van Woodson, a patrol officer on the Westminster Police Department, responded to a call about a residential burglary in the late morning of February 26, 2008. He entered into two of the three sections of the home. One of the sections had been ransacked. In another section, a large television was off its base and drawers were pulled

out. Woodson found pry marks and a screen removed from a window of the house. The residents prepared a list of items they believed were stolen.

Detective Robin Kapp, currently assigned to residential burglary viewed the surveillance video which showed three suspects. Still photographs of the suspects were “sent to all Orange County agencies.” The photographs were also placed in a bulletin which is distributed to police departments in Orange County and Long Beach. Defendant was identified as one of the persons on the video.

Tim Walker, another officer with Westminster Police Department, works in the gang unit. He said Kapp asked him “to come along and help him interview the defendant because they believed there was some gang involvement in this case.” Walker and Kapp interviewed defendant, and Kapp recorded it.

In his interview, defendant was asked about a gang called the Suicidals. Defendant said he “got jumped in” a long time ago, but stopped “hanging out” with the gang six months ago. But when Walker asked “who’s the Suicidals cool with?” Defendant responded: “We-we cool with everybody.”

Walker asked defendant: “Can you sit there and tell me, swear on your mother, that you didn’t, you—that you don’t know anything about a residential burglary?” Defendant answered: “I swear to God on my Momma’s life.” Then Walker told defendant the victim had a video camera, and played the videotape. After that, Walker asked defendant how he entered the residence, and this time defendant said: “I can’t remember sir, I swear. I swear. I swear to God, man on my Grandma, rest in peace, man” explaining it was “cause [he] smoked a lot of marijuana, man.” Later defendant remarked: “Okay, then I’m in the house then, sir. Do what you got to do. I’m recorded. I know that.”

Kapp interviewed defendant and showed him the video. At the end of the interview, Kapp asked him whether he wanted to write a note of apology. Defendant wrote: “I’m sorry for going into your house.”

Defendant identified one of the other two in the video as his cousin, Anthony San. But he would not identify the other person. Walker told him he could just nod his head up and down to mean “yes” and nod his head across to mean “no,” and that he did not have to answer aloud when he asked: “One of the reasons you don’t want to comment about this guy in the gray sweatshirt is because . . . [H]e’s involved in the same gang as you were, correct?” Defendant nodded up and down. Walker followed up with: “Then if you’re to rat on him, what are the possible outcomes for you? You could be, you could be, uh, jacked up, right? You could be, you could be, um, be taxed? And you could probably even be killed, correct?” Defendant answered: “Yes sir.” Defendant said he was not going to rat on anybody “‘Cause you already got my-my-my picture already in there so I’m already . . . I’m going to take the blame for it, sir.”

When Kapp asked defendant about his new car, defendant was at first evasive and asked the detective: “What kind of car?” Kapp responded: “You know what kind of car you bought. You bought a car and you paid cash for it. How much of the eight grand did you keep?” Defendant said: “Sir, I didn’t take nothing like no money out of that apartment, man. I don’t know anything, sir.” Later in the interview, Kapp again pursued in questioning about a car defendant had just purchased. Again defendant was hard to pin down. Finally he admitted: “I got a Cutlass Supreme two thousand.” Kapp asked: “Okay, is that the one you paid cash for?” Defendant said “yes,” and the questions and answers continued: Q: “And how much did you pay for that?” A: “Two-thousand, sir.” Q: “You paid how much?” A: “Two thousand.” Q: “How much?” A: “Two-thousand.” Q: “How much?” A: “I just said it, sir.” Q: “What?” A: “I just said it, sir.” Q: “And how did you get two thousand ‘cause you’re not working?” A: “Yes I am, sir. I’m working under the table too at the same time, sir. Like I said, I’m working with my father, Chinese food . . . .”

### *Gang Expert*

Long Beach Police Officer Udom Sawai, who has been with the gang unit for five years, testified as a gang expert. He testified he is familiar with a gang called the Suicidal Crips, which is mostly composed of Cambodian and Laotian members and is “one of the major gangs in the City of Long Beach.” As of February 26, 2008, the gang had “a little bit over a hundred documented” members. The Suicidal Crips consider “any Asian gang or other gang that represents the blue rag or Crip gang” to be allies. He described it as “an ongoing criminal street gang that is very active at that time and still now today, where they have committed numerous and ongoing numerous criminal activities in the City of Long Beach and other surrounding cities throughout the state basically.”

The first time Sawai had contact with defendant was seven years ago when he discussed a different gang, the Crazy Ruthless King, with defendant. He met defendant next three or four years ago; at that time, the detective spoke with defendant about the Suicidal Crips. Defendant told Sawai he belonged to the Suicidal Crips gang. The third contact Sawai and defendant had was in 2007 or 2008 when defendant again stated he was a member of the Suicidal Crips.

During the third contact, the detective viewed defendant’s tattoos which Sawai described. On his forearm, “one five” is tattooed, which “represents the area which the gang originally started.” Another tattoo on his arm says “Suicidals.” There is an “artsy-type” of tattoo on defendant’s right shoulder. “Long Beach” is also tattooed on defendant’s body, which Sawai said signifies “they’re claiming a certain part of Long Beach just to distinguish themselves” from San Bernardino Suicidals.

Sawai said he is familiar with the primary activities of the Suicidal Crips “by talking to them, and gang members telling me what they do, and by investigating the crimes that were committed by them, and basically just by talking to them.” He said their

primary activities are shootings, homicide, robberies, burglaries, theft “all the way down to simple graffiti and assault.”

Respect is very important in the gang and one way to lose respect is “by so-called snitching, by telling the cops, cooperating with the police officers or detectives . . . . And by not doing his fair share . . . of dirt or work, meaning to participate or commit criminal activities for the gang, such as, robberies and burglaries, shootings and stuff that I mentioned earlier.” Sawai said that stealing property “gives the gang financial back up, financial benefit or money.”

Members of the gang are also expected to back each other up and that could include taking blame for something. Regarding situations involving a member of the gang testifying against another member, Sawai said: “Well, that’s one of the cardinal sins of being a gangster is cooperate with the police officer or officers, basically being a snitch. That is heavily frowned upon by gang members. The results could be deadly.” He also said gang members share information about crimes with each other to increase their status within the gang and to put out the message they are to be feared in the community.

Sawai said the Suicidal Crips do claim “a loose area in the City of Long Beach” as their territory, but added that Asian gangs are transitory. He said “their turfs are loosely claimed.” The gang has its own symbols and hand signs. The number 15 and a blue rag identifies the gang.

Sawai provided the prosecutor with two certified court packets. One packet involves Bunhom Plomma, who pled guilty to burglary on January 9, 2002, and the other packet relates to Thonee Chamroum, who pled guilty to auto theft on December 29, 2004. Both are active members of the Suicidal Crips.

The prosecutor presented a set of hypothetical facts mirroring the actual facts here and asked Sawai whether or not the crime was done for the benefit, at the direction or in association with a criminal street gang. Sawai said it benefits the gang

because it “gives the gang financial back up, financial benefit or money.” He said: “It’s in direction of the criminal street gang because it’s done with at least three people that committed the crime, so it’s basically — it’s in the direction of a gang,” and it’s in association with a criminal street gang because he committed the burglary with another Suicidal Crip gang member.

The prosecutor asked the gang expert why gang members may not want to leave any indication of gang involvement, such as graffiti, at the scene of a crime or whether or not he has learned through his investigations any reason why gang members do not “claim their gang during those property crimes?” Sawai responded: “The reason for it is that the laws are a lot stiffer and they don’t want to leave a trail of their gang being investigated by police officers.”

Prior to trial, defendant moved pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535, for discovery of complaints or resulting investigation reports concerning Sawai. In his appeal, he requests this court review the sealed transcript “to determine whether the trial court was correct in determining that there was no discoverable material.” The Attorney General has no objection. We have reviewed the sealed transcript and find no error.

## II

### DISCUSSION

#### *Sufficiency of Evidence*

Defendant contends the evidence is insufficient to support the findings on the gang allegations and his conviction for street terrorism. He argues: “The sole evidence presented to support this gang allegation was the testimony of . . . Sawai,” and that he “could offer only speculation, conjecture, guess-work and surmise.” Regarding his street terrorism conviction, defendant contends: “Here, the prosecution did not present evidence of any allegedly gang-related crimes committed by appellant other than the crimes with which he was charged in this case.”

In reviewing a case for sufficiency of the evidence, the standard of review is whether ““on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.]” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) As we stated in *In re Alexander L.* (2007) 149 Cal.App.4th 605 at page 610: ““Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]” (*People v. Olguin* (1999) 31 Cal.App.4th 1355, 1382.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard of review applies to gang allegations. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)”

In *People v. Martinez* (2008) 158 Cal.App.4th 1324, the court held the evidence was sufficient to support the defendant’s conviction of street terrorism under Penal Code section 186.22, subdivision (a) when there was evidence the defendant was an active gang member, had a street moniker, bore gang tattoos and committed one of the crimes which an expert testified were one of the gang’s primary activities. (*People v. Martinez, supra*, 158 Cal.App.4th at p. 1331.) (All further statutory references are to the Penal Code.)

“(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for



a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.” (§ 186.22, subd. (a).)

Section 186.22, subdivision (b)(1) provides an enhancement for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .” Defendant contends the evidence is insufficient to support the gang enhancements. Specifically, defendant contends “It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.]” (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

In his brief, defendant acknowledges the evidence supports “at least an inference that appellant was a member of the gang . . . .” Defendant told the police his street name is Slick. Sawai described defendant’s gang tattoos. He also related various conversations he has had with defendant over the years about the Suicidal Crips, as well as defendant’s admissions that he belonged to the gang. Defendant committed the instant burglaries with two other people; he acknowledged one of them was also a member of the gang. In his interview defendant said, “They just told me to come along with them, man,” confirming the gang expert’s opinion that gang members are “expected to back each other up.”

Sawai opined about the hypothetical facts, which mirrored the facts in this case, that the burglaries were committed for the benefit of and in association with the gang. He explained that burglary is one of the gang’s primary activities, and that gangs want to be feared. Evidence of convictions for burglary and auto theft of two other active members of the gang was admitted. The expert explained that gangs require the finances gained from crime, and gang members are expected to do their fair share by participating in criminal activity.

Under the circumstances in this record, we must conclude there was no error. Substantial evidence supports both the jury's true findings for the gang enhancements and defendant's conviction of street terrorism.

#### *Section 654*

Defendant's next argument lacks merit as well. For the street terrorism conviction, defendant was sentenced for the midterm of two years to be served concurrently with his sentence for the burglaries. He contends his sentence for street terrorism should be stayed under section 654 since he "harbored a single intent and objective in committing all of the charged offenses."

"Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." (§ 186.22, subd. (a).)

Section 654, subdivision (a) declares, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Whether section 654 applies is generally a question of fact. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) Thus, except in cases of "the applicability of the statute to conceded facts" (*People v. Harrison* (1989) 48 Cal.3d 321, 335) "the trial court's finding will be upheld on appeal if it is supported by substantial evidence[] [citations]" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583).

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and

objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

Relying on the *Neal* rule, several courts have considered the question of whether section 654 permitted separate punishment for a defendant convicted of street terrorism as well as one or more other felonies, and reached varying results based on the facts in each case. (E.g., *People v. Mesa* (2010) 186 Cal.App.4th 773; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034; *People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 935; *In re Jose P.* (2003) 106 Cal.App.4th 458, 468-471; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466-1468.)

*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315, stated “the crucial point is that . . . the defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.” Sanchez decisively concluded “it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies.” (*Ibid.*)

The *Sanchez* approach was criticized in *People v. Mesa*, *supra*, 186 Cal.App.4th at page 786, stating that “it depends on both the commission of the underlying offense *and* the separate act of actively participating in a gang. Thus, . . . liability under section 186.22, subdivision (a), necessarily depends on conduct distinct from the conduct which gives rise to liability for any underlying offense.”

Both approaches require a separate and independent objective if a defendant is to be punished for committing both the underlying crime as well as street terrorism. The facts in this case show defendant had separate and independent objectives when he committed the burglaries and the street terrorism. The expert described how

gang members must do their fair share of the “dirt” or “work” by committing robberies and burglaries to give the gang “financial back up.” He also said gang members can lose respect if they do not do their fair share. Accordingly, a jury could have reasonably concluded that defendant committed the instant burglaries with the objective of providing finances to his gang and keeping up his own status within the gang. The facts also demonstrate evidence from which a reasonable inference could be drawn that defendant committed the burglaries to line his own pockets by keeping part of the loot for himself. Although he tried to evade answering the detective, he finally admitted he paid \$2,000 cash for a car he recently purchased.

Under the circumstances in this record, we cannot conclude the trial court erred when it punished defendant for both crimes. The evidence supports an inference that when he committed the burglaries and street terrorism, defendant had the objectives of doing his “dirt” or “work” of providing financial support to the gang and maintaining his respect. And the evidence also supports an inference that when he committed the burglaries, defendant had the objective of buying himself a new car.

### III

#### DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.